

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
THOMAS V. LESKOVEC,)	
)	
Complainant,)	
)	Charge No.: 2004CF2280
)	EEOC No.: N/A
)	ALS No.: 06-049
GAME WORKS L.L.C.,)	
)	Judge William J. Borah
Respondent.)	

RECOMMENDED ORDER AND DECISION

On February 23, 2006, Complainant filed his Complaint, *Pro Se*, with the Illinois Human Rights Commission. The Complaint alleges that Respondent, Game Works, L.L.C., discriminated against Complainant on the bases of his race, physical disability, mental disability and retaliation, when it placed him on a mandatory medical leave and later discharged him.

This matter now comes to be heard on Respondent's "Motion to Dismiss and/or For Summary Decision." Respondent presents three grounds for dismissal of the Complaint: 1) Stipulation and Release in Bankruptcy; 2) Accord and Satisfaction; and 3) Res Judicata. Respondent also requests Section 8A-102(I)(5) attorney's fees from Complainant. Complainant filed a written response to the motion, and Respondent filed a written reply to that response. In addition, Respondent has submitted various documents and an affidavit from Bruce Nussbaum, Esq., with exhibits. The matter is ready for decision.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavit and other documentation submitted by the parties. The findings did not require, and were not the result of credibility determinations. All facts were viewed in the light most favorable to Complainant.

1. Complainant was hired by Game Works in March of 2003.
2. On October 15, 2003, Complainant was placed on a mandatory medical leave from his employment duties.
3. By December 2003, Respondent was aware of Complainant's mental disability.
4. On January 4, 2004, Complainant attempted to return to his position from the medical leave, but was not allowed to return by Respondent.
5. On February 11, 2004, Complainant filed a Charge of discrimination with the Illinois Department of Human Rights, hereafter Department, and on June 14, 2004, amended his Charge to add an allegation of retaliation.
6. On February 23, 2004, Complainant filed his Complaint, *Pro Se*, before the Illinois Human Rights Commission.
7. On March 9, 2004, Respondent filed a Petition under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Central District of California, Case No. LA 04-15404-BB, hereafter Bankruptcy Court.
8. On or about September 2004, Complainant filed a Proof of Claim in Respondent's Bankruptcy Court proceeding based on his allegations of illegal discrimination. He was represented by legal counsel.
9. On June 15, 2005, the parties signed a "Stipulation Re: Proof of Claim Filed by Thomas Leskovec," (Complainant), which read, in part, that Complainant was a general unsecured creditor in the amount of \$1,200, and that "Leskovec (Complainant) waives any and all other claims against the Debtor's estate." The document, hereafter Stipulation, referenced the Illinois Department of Human Rights.
10. The Stipulation was approved on June 20, 2005, by the US Bankruptcy Court. The Court's Order included the \$1,200.00 amount agreed in the Stipulation for Complainant, and a release that read, "Other than the allowed claim as set forth

above, Thomas Leskovec hereby waives any and all other claims against the Debtor's estate."

11. By check, dated December 23, 2005, Complainant was paid by Respondent ten cents per dollar on his claim of \$1,200.00. By check dated July 14, 2006, Complainant was paid an additional thirty cents per dollar on his claim of \$1,200.00.
12. Complainant endorsed the checks, and deposited them on or around January 24, 2006, and July 31, 2006, respectively.
13. During the pendency of the Bankruptcy proceeding and afterwards, the investigatory process of the Department concluded on June 1, 2005. A decision on Complainant's Request for Review by the Chief Legal Counsel of the Department was filed on January 14, 2006. Complainant also filed an appeal with the Illinois Appellate Court of Illinois concerning the Department's decision to dismiss his Charge. The Court rendered its Order on February 9, 2007. Complainant, *Pro Se*, filed his Complaint with the Commission on a timely basis on February 23, 2004. A number of preliminary motions were filed and decided by the Commission. None of the actions taken by the Department, Commission and Appellate Court are in controversy here. The Commission lifted its stay on April 24, 2007.
14. The Respondent filed its "Motion to Dismiss and/or For Summary Decision" on April 6, 2007, and a briefing schedule was set on April 24, 2007.
15. Respondent has not filed an Answer to the Complaint.

CONCLUSIONS OF LAW

- 1.) Complainant's June 15, 2005, Stipulation with Respondent and its incorporation by Order of the U.S. Bankruptcy Court on June 20, 2005, bars Complainant from going forward with his claims of discrimination before the Commission.
- 2.) The Commission lacks jurisdiction of Complainant's claims.

3.) There is no genuine issue of material fact, and Respondent is entitled to a recommended order in its favor as a matter of law.

4.) A summary decision in Respondent's favor is appropriate in this case.

DISCUSSION

Preliminary Matters

1) Choice of Remedy

Respondent attempted to create a hybrid pleading from two distinct but similar remedies when it titled its Brief, "Motion to Dismiss and/or For Summary Decision." It is for the Respondent to select its motion and, after some search, it did, by citing Section 8-106.1 of the Illinois Human Rights Act in the body of its motion. This section specifically provides that either party may move, with or without supporting affidavits, for a summary order in its favor. Thus, Respondent's pleading is considered a Motion for Summary Decision.

2) Proper Party Respondent

In footnote 1, on page one of Respondent Motion, it contends that it "...does not consent that it is the proper party to this proceeding." It further states, that it "...reserves the right to file subsequent pleading..." Comp. Br. p. 1. It is for the Respondent to prioritize and select its Motions. However, throughout the different avenues of litigation with Complainant, Respondent has reacted as if it were the real party of interest, and held itself out as Game Works. Id. In Mary Schoultz and Wildwood Industries, IHRC, ALS No. S-4310, March 1, 1996, the Commission warned, "Absent any motion to change the misnomer, the Complaint governs the naming of the Respondent herein." Misnomer is not the same as mistaken identity. Charles Jones and Zooid, L.T.D., IHRC, ALS No. 5398, April 26, 1996. Therefore, the Respondent is the real party in interest.

3.) Complainant as a *Pro Se* Litigant

Pro Se Complainant, Thomas Leskovec, shepherded his case throughout a number of state forums, authoring pleadings and submitting written responses. There is some sympathy

with the *pro se* litigant, as the practice of law requires skills that sometimes test the abilities of licensed attorneys. However, “Justice requires that the parties live with litigation decisions they have made, either through their attorney or on a *pro se* basis.” Fitzgerald and Fischer Imaging Corp., IHRC, ALS No. 10142, May 29, 1998.

The fact that Mr. Leskovec is a *pro se* litigant has no influence on this decision, as “...a *pro se* litigant is held to the standard of an attorney.” Mininni and Inter-Track Partners, IHRC, ALS No. 7961, December 10, 1996 quoting, First Illinois Bank and Trust v. Galuska, 155 Ill. App. 3d 86, 627 N.E. 2d 325 (1st Dist. 1993). The Illinois Appellate Court advises, “Our task is not to divine the truth from the interstices of the parties’ filings or to sift through the record like a tealeaf reader conjuring up fortunes in order to gain a proper understanding of the case before us.” *Id.* Mr. Leskovec’s written Response is held to the mandatory standards cited below.

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm’n, 267 Ill. App. 3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill. App. 3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist. 1979). Although not required to prove his case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill. App. 3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill. App. 3d 881, 883-84, 567 N.E.2d 629, 630-31 (2^d Dist.

1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill. App. 3d at 392, 642 N.E.2d at 490. Where the movant's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a complainant's failure to file counter-affidavits in response is frequently fatal to his case. Rotzoll v. Overhead Door Corp., 289 Ill. App. 3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

Supreme Court Rule 191 is satisfied if, from the affidavit as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial. Smith v. United Farm Mutual Reinsurance, 249 Ill.App.3d 686, 619 N.E.2d 263 (5th Dist. 1993).

STIPULATION AND RELEASE IN BANKRUPTCY

Although Respondent submitted a number of arguments in its Motion, the issue of Complainant's Stipulation in Bankruptcy Court is most compelling.

On February 11, 2004, Complainant filed a Charge of discrimination with the Department, and on June 14, 2004, amended his Charge to add an allegation of retaliation. Complainant, *Pro Se*, filed an unverified Complaint with the Commission on February 23, 2004. By the date of Complainant's filing of his Complaint with the Commission his factual allegations of discrimination were set and memorialized, and the law and forum chosen.

Afterwards, on March 9, 2004, Respondent filed a petition under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Central District of California, Case No. LA 04-15404-BB. Nussbaum Aff. #3.

The affiant, Bruce Nussbaum, represented in his affidavit that he has personal knowledge of the factual statements enclosed, as he served as General Counsel for Sega

GameWorks L.L.C., the bankruptcy Estate Representative and bankruptcy Plan Administrator. Nussbaum Aff. #1 & 2.

On September 7, 2004, Complainant filed a Proof of Claim with the Bankruptcy Court, alleging as the basis for his claim, a "Discrimination Lawsuit." It was signed by Complainant, Thomas Leskovec. Resp. Exh. D, Nussbaum Aff. #4. Complainant does not deny the filing of the Proof of Claim, the content of the document or the signature on it as his own. Exh. 1. Also, Complainant did not reference any other "discrimination lawsuit" in the content body of the Proof of Claim, other than the Charge filed with the Department and, later, the Complaint with the Commission. Because Complainant failed to deny Respondent's factual contentions cited in Mr. Nussbaum's Affidavit and his Exhibit 1, they will be admitted as fact. Rotzoll, supra.

Respondent asserts that Complainant was represented by an attorney, Mr. Robert Pinzer, during the Bankruptcy court proceedings, and negotiated with Respondent a Stipulation. Nussbaum Aff. #7. and his Exh. 2. The text of the Stipulation, paragraph #3, identified the location of the "law suit" as before the "Illinois Department of Human Rights." The content of the Stipulation also provided that Complainant was an "unsecured creditor in the amount of \$1,200.00," and ... "Leskovec (Complainant) waives any and all other claims against the Debtor's estate." The document was signed by Complainant's attorney, Mr. Robert Pinzer, and Respondent's attorney. *Id.*

The Stipulation was approved by Order of the Bankruptcy Court on June 20, 2005. Nussbaum, Aff. #8, his Exh. 2. The Court's Order reiterated Complainant's general unsecured claim amount of \$1,200.00, and that "... Thomas Leskovec hereby waives any and all other claims against the Debtor's estate."

By a check dated December 23, 2005 Complainant was paid ten cents per dollar on his claim of \$1,200.00. On July 14, 2006, Complainant was paid thirty cents per dollar on his claim. By his endorsement on the back of the checks, Complainant deposited the checks on or about January 24, 2006, and July 31, 2006. Nussbaum, Aff. #10 and #11, his Exh. 3.

COMPLAINANT'S RESPONSE

Complainant submitted a written response which is a difficult read. So are many other authors of note. However, Complainant's writing style must be confined to that of an attorney. He is required to provide "some facts" and not "mere conclusions of law." If Respondent "supplies sworn facts," as in this case, they cannot remain "uncontroverted" by Complainant if he hopes to prevail; the affidavits cannot stand uncontroverted. "The facts contained therein must be accepted as true and, therefore, a complainant's failure to file counter-affidavits in response is frequently fatal to his case." See above, Summary Decision Standard and Complainant as *Pro Se* Litigant.

Complainant's Response filed May 18, 2007, is not signed, notarized or sworn. Respondent did not object to the form, so the discussion will address the content. "The Commission must treat all litigants fairly, but equally. We can not bend over backwards to help a *pro se* Complainant prove his case." Sherman and Advance Transportation, IHRC, ALS No. 7996 August 2, 1996. After sifting through the substance of Complainant's material, the relevant defenses are found to be inadequate. Complainant fails to deny the facts averred in the affidavit of Mr. Bruce Nussbaum and his attached exhibits concerning Complainant's Proof of Claim in Bankruptcy Court, the content of Stipulation, the Court Order of June 20, 2005, which included language of general release, and the transferring over to, and the depositing of, the checks by Complainant. Complainant's Proof of Claim was described as a "discrimination lawsuit." The Stipulation, signed by Complainant's attorney, specifically identifies the Illinois Department of Human Rights as the forum to investigate his discrimination claim. All factual allegations of discrimination occurred prior to the Stipulation by the parties and Court Order, as represented by Complainant's Charge and amended Charge with the Department. There is no misunderstanding as to the sequence of events, purpose, forum and acts of the parties by the time of the Court Order of June 20, 2005. As Complainant failed to deny the factual contentions cited above, they will be admitted as fact.

Complainant cites as a defense that he experienced other harms subsequent to the date of the Amended Charge and that the Stipulation was not made clear to him. Comp. Br. p.1-3. Although Complainant's arguments are conclusionary, even taken as true, they do not change the fact that there was a resolution to the Bankruptcy case which included a settlement of his discrimination case, and language of a general release of any and all of his claims.

Respondent cites, Lindi DeManes and The Lowen Group International, Inc., IHRC, ALS No. S-10943 September 3, 2002, where the Complainant had executed a settlement agreement in Bankruptcy court. Although the Complainant in that case was not compensated as agreed, unlike here where Complainant was paid and checks were deposited, the Commission still lost jurisdiction of the claim.

Complainant fails to present any factual basis that would create a triable issue.

ATTORNEY'S FEES

Respondent moved for Section 5/8A-102(I)(5) attorneys fees from Complainant. It claims that his Charge was filed in a number of forums and Complainant should have dismissed them voluntarily. However, it was Respondent that decided to continue with this litigation just as much as the Complainant. Respondent could have filed a proper motion concerning its status as a real party in interest in the case, or as here, it could have selected a forum to decide on the acknowledgement of the Bankruptcy Order of June 20, 2005, and Complainant's payment. Both questions create jurisdictional issues that could have been decided at the early stage of the litigation, but Respondent decided to ignore those options. Therefore, the motion for attorney's fees for Respondent against Complainant is denied.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the complaint in the matter be dismissed in its entirety, with prejudice. Motion for Attorney's fees is denied.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: December 8, 2009